

But that case was properly distinguished by the learned Assistant Judge, who pointed out that the present case has nothing to do with rights created by statute, for the enforcement of which a special remedy is given. We set aside the decision of the District Judge, and remand the case for disposal upon the other issues. The respondent must pay the appellant's costs of this appeal.

Decree reversed and case remanded.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

JHAVER JIJIBHAI (ORIGINAL DEFENDANT 2), APPELLANT *v.* HARIBHAI HANSJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Bhagdari Act (Bom. Act V of 1862), section 3—Will—Whether devise by will amounts to an alienation—Alienation not expressly limited to transactions inter vivos—"Alienation," meaning of.

* The devise by will of an unrecognised sub-division of a *bhag* is an alienation contravening the provisions of the Bhagdari Act.

SECOND appeal against the decision of Mohanrai D., First Class Subordinate Judge, A. P., at Broach, confirming the decree passed by B. H. Desai, Subordinate Judge at Broach.

Suit to recover possession.

The properties in suit belonged to the *bhag* of one Bai Ganga after whose death they were inherited by Haridas Hansraj (plaintiff) and Shanker Sakhidas, the father of Bai Dahi (defendant No. 1). Shanker having died, the plaintiff alleged that he was entitled to succeed to his share in preference to his daughter Dahi, who

1915.

WASAPPA
v.
SECRETARY
OF STATE
FOR INDIA.

1915.

September 16.

* Second Appeal No. 443 of 1914.

1915.

JHAVER
JIJIBHAI
v.
HARIBHAI
HANSJI.

was excluded by custom from inheriting his *bhag* property or to his *Kothai* brother (uterine brother) Jhaver Jiji (defendant No. 2), who was not an heir according to Hindu Law; and that Shankar's will in their favour being of an unrecognised sub-division was void under the Bhagdari Act.

The defendants contended that the property in dispute was not originally a Bhagdari village. Shankar was the owner of the disputed properties and was in independent possession thereof; and that his will was valid and operative and they were his heirs under it.

The Subordinate Judge held that plaintiff was Shankar's heir in preference to his daughter or 'Kothai brother' and that Shankar's will in respect of his unrecognised sub-division was void and inoperative. He, therefore, passed a decree in favour of the plaintiff awarding possession.

On appeal, the District Judge confirmed the decree.

The defendant No. 2 preferred a second appeal to the High Court.

G. N. Thakor, for the appellant:—The only point is whether the devise by will is an alienation within the meaning of the term as used in section 3 of the Bhagdari Act, 1862. The portion devised was an unrecognised portion of a *bhag* and it was to other than a Bhagdar. But the section aims at alienations *inter vivos*—during the life-time of the donor. The terms "mortgage," "sale," "lease" used in the section all contemplate that the alienation comes into effect at the time of the deed but a devise by will is not such an alienation. So long as he is alive, it cannot be said that he has alienated. There is no express case on the point. In *Muhammad Sayeed v. Muhammad Ismail*⁽¹⁾, it was

⁽¹⁾ (1910) 33 All. 233.

held that under section 325A of the Civil Procedure Code, 1882, a gift by a Mahomedan during last illness would operate as a will and is not an alienation falling within the prohibition contained in that section.

[SHAH, J.:—But that is not a case under the Bhagdari Act. The object of section 325A is different. We have to consider the aim and policy of the Bhagdari Act.]

The word “alienation” should, I submit, not be construed in a wide or comprehensive sense, but only *ejusdem generis* with the other words in the section which contemplate alienation during life.

T. R. Desai, for the respondent, was not called upon.

SCOTT, C. J.:—The only point which has been seriously argued in this case is whether the lower Courts have erred in holding that the dispositions in the will amounted to an alienation contravening the provisions of the Bhagdari Act. The word “alienation” ordinarily means an act in the law by which property passes from one to another. It can pass from one to another either by transfer *inter vivos* or by testamentary devise: the words of the Bhagdari Act do not expressly limit alienations to transactions *inter vivos*, and to so limit them would be to a large extent to defeat what is well known to be the object of the Act. We, therefore, affirm the decree and dismiss the appeal with costs.

Decree confirmed

J. G. R.

1915.

JHAVER
JJIJBHAI
v.
HARJIBHAI
HANSJI.